

INNOCENT UNTIL PROVEN GUILTY? NOT IF YOU'RE TEACHING ME: A TEXAS TEACHER'S RIGHT TO PROCEDURAL DUE PROCESS

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*"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice."*¹

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1. Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

I. INTRODUCTION

One of the most precious rights afforded by the United States Constitution is a person's right to due process under the law.² Stated differently, the state cannot deprive one of life, liberty or property without providing that person with both notice of the intended deprivation, and an opportunity to challenge such a deprivation.³ While protection from a deprivation of life, liberty, or property without due process of law is one of the most important rights an individual possesses, the United States Supreme Court consistently interprets the Fourteenth Amendment vaguely, allowing American tribunals to interpret the standard as narrowly as they choose.⁴

A prime example of this phenomenon occurs with the Texas Education Agency's ("TEA") tendency toward a narrow interpretation of a teacher's procedural due process rights. In Texas, the state government takes on the responsibility of regulating the certification of its teachers.⁵ The state agency that has been appointed this responsibility is the State Board for Educator Certification ("SBEC").⁶ Section II of this comment will address SBEC's current procedures governing teacher misconduct. In section III, a brief history of procedural due process is set forth with an explanation of exactly why teachers deserve procedural due process of law, followed by an analysis of the reasons why such protection is being denied. Finally, section IV will propose a solution that attempts to preserve the current system as much as possible.

2. See U.S. CONST. amend. XIV, § 1 (ensuring that no "State [shall] deprive any person of life, liberty, or property, without due process of law.").

3. See *McGrath*, 341 U.S. at 171-72 (articulating that there is no better way to uncover the truth than providing notice and an opportunity to be heard to the individual in jeopardy).

4. See Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 115, (1978) ("Although sweeping and colorful. . . judicial attempts at articulating a meaningful constitutional standard leave much to be desired.").

5. See generally TEX. EDUC. CODE ANN. § 21 (Vernon 1996 & Supp. 2004-2005) (outlining educator certification, disciplinary procedures, and governing the State Board for Educator Certification).

6. See generally Act of May 30, 1995, 74th Leg., R.S., ch. 21, 1995 Tex. Sess. Law Serv. 2 (Vernon) (codified as amended at TEX. EDUC. CODE ANN. § 21 (Vernon 1996 & Supp. 2004-2005)) (creating SBEC's authority for all disciplinary procedures with regard to a teaching certificate); see also TEX. EDUC. CODE ANN. § 21.031 (Vernon 1996 & Supp. 2004-2005). When this comment was written, SBEC and the Texas Education Agency "TEA" were two separate agencies, but SBEC recently merged under the TEA umbrella. SBEC will still be the authority on certification and disciplinary proceedings for educators. See Press Release, Texas Education Agency, TEA to SBEC: Welcome Home! (Aug. 11, 2005), <http://www.tea.state.tx.us/press/sbcrelease.html>.

II. THE CURRENT STATE OF AFFAIRS

A. Overview

Current SBEC procedures, at the very least, resemble violations of educators' procedural due process rights. Take, for example, a teacher who has been accused of sexual misconduct with a student.⁷ The employing school district must provide written notice to the teacher of a proposed termination of employment.⁸ The teacher will then proceed through a series of hearings pertaining to the teacher's employment within the school district.⁹ Even in the scenario where a teacher resigns, the district is still required to report the alleged misconduct to SBEC.¹⁰

A subtler example is also conceivable. For instance, consider teacher *A*, who does not get along with teacher *B*. Teacher *A* can file a complaint directly to SBEC,¹¹ citing a marginal code of ethics violation against teacher *B*.¹² Complaints for code of ethics violations can be filed for violations as inconsequential as spreading rumors about teacher *A*.¹³ Any complaint results in an investigatory warning that will be attached to teacher *B*'s certificate prior to investigation.¹⁴

In either situation, the teacher's virtual certificate is "flagged" with an investigatory warning until SBEC initiates a formal complaint with the

7. Unfortunately, this is not an uncommon occurrence. See, e.g., *Tisby v. Dallas Indep. Sch. Dist.*, No. 067-R2-100 Comm'r of Educ. State of Texas (2000); *Texas Educ. Agency v. Averiett*, No. 200-TTC-391 Comm'r of Educ. State of Texas (1991).

8. See generally § 21 (articulating termination procedures for probationary, continuing and term contracts).

9. See TEX. EDUC. CODE ANN. § 21(F)-(G) (Vernon 1996 & Supp. 2004-2005) (outlining the administrative hearing process as well as appeals to the commissioner of education).

10. See 19 TEX. ADMIN. CODE § 249.14(d) (2004) (stating that the school district's superintendent shall notify SBEC within seven days of obtaining any knowledge indicating, among other violations, sexual misconduct of a minor); see also State Board for Educator Certification, Frequently Asked Questions, <http://www.sbec.state.tx.us/SBECOnline/invest/disc/faq.asp> (last visited Oct. 11, 2005).

11. Linda L. Schlueter, *Parental Rights in the Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY'S L.J. 611, 668 n.384 (2001) (citing the authority allowing parents and teachers to file complaints directly to SBEC) (citing 25 Tex. Reg. 5332 (2000) (to be codified as an amendment to 19 TEX. ADMIN. CODE § 249.56)).

12. See generally 19 TEX. ADMIN. CODE § 247 (2004) (dictating code of ethics violations).

13. See 19 TEX. ADMIN. CODE § 247.2(b)(2)(B) (2004) (stating that a code of ethics standard is breached when a teacher knowingly makes false statements regarding another teacher).

14. Memorandum from Herman L. Smith to State Board for Educator Certification, Action on Petition for Adoption of a Rule Relating to 19 TAC Chapter 249 (Aug. 6, 2004), http://www.sbec.state.tx.us/SBECOnline/brdinfo/agendas/2004_08/5.pdf.

State Office of Administrative Hearings ("SOAH"),¹⁵ which is the arbitrator of such matters.¹⁶

These hypothetical situations were chosen for two reasons. First, they help illustrate the arbitrary character of the disciplinary procedures wherein the two alleged acts of misconduct are treated without distinction.¹⁷ Second, according to SBEC website, these are the two most common acts of misconduct that are investigated by SBEC.¹⁸

B. SBEC

1. Overview

The SBEC was created in 1995 to oversee all matters concerning teacher certification.¹⁹ Before 1995, the responsibility rested solely on the shoulders of the TEA.²⁰ The SBEC was created in a legislative effort to expand teachers' rights by allowing them to govern themselves.²¹ The original legislative intent invokes a sense of irony, as it may be argued that despite the desire to augment teachers' autonomy, their rights have actually become more restricted by the current adjudication procedures.

The SBEC was created to "grant educators the authority to govern the standards of their profession."²² This includes the regulation of all facets of the standards of conduct, continuing education, and certification of public school educators.²³ The SBEC is comprised of fourteen mem-

15. See *id.* (stating the procedures of placing an investigative warning on a teacher's certificate).

16. See *id.* (summarizing SBEC's flagging of virtual teaching certificates); see also TEX. EDUC. CODE ANN. § 21.252 (Vernon 1996) (allocating jurisdiction to SOAH).

17. Julie Leahy, Tex. Classroom Teachers Ass'n, PETITION FOR ADOPTION OF A RULE, (July 5, 2004) (unpublished petition, on file with author) (arguing that the current procedures do not distinguish the different types of misconduct are not distinguished).

18. See State Board for Educator Certification, <http://www.sbec.state.tx.us/SBECOnline/investdisc/caseinvesthistoricalcoding.pdf> (showing that, as of May 31, 2005, the percentage of cases for sexual misconduct and code of ethics violations had changed to 27% and 14% respectively) (last visited Oct. 11, 2005).

19. Act of May 30, 1995, 74th Leg., R.S., ch. 21, 1995 Tex. Sess. Law Serv. 2 (Vernon) (codified as amended at TEX. EDUC. CODE § 21 (Vernon 1996 & Supp. 2004-2005)) (providing authority to SBEC for all disciplinary procedures).

20. Since this comment was written, TEA has again merged with SBEC, though SBEC remains solely responsible for all matters involving certification, and disciplinary procedures as they pertain to this comment were left unchanged. See Press Release, Texas Education Agency, TEA to SBEC: Welcome Home! (Aug. 11, 2005), <http://www.tea.state.tx.us/press/sbecrelease.html>.

21. See TEX. EDUC. CODE ANN. § 21.031 (Vernon 1996 & Supp. 2004-2005) (requiring the majority of board members be educators in some capacity, allowing educators to govern themselves).

22. *Id.*; see also 19 TEX. ADMIN. CODE § 249.4(a) (2004) (specifying the duties of the SBEC).

23. TEX. EDUC. CODE ANN. § 21.031(a) (Vernon Supp. 2004-2005).

bers.²⁴ The composition of the voting board members is as follows: four classroom teachers, two administrators, one counselor, and four members of the general public.²⁵

There are two primary explanations for SBEC's failure to adequately empower teachers to govern themselves. The first is that, while the board members are mostly educators in some capacity, they have been appointed by the Governor of Texas.²⁶ Therefore, rather than merely acting in accordance with their personal convictions, the majority of these board members have conflicting political agendas. The second reason is that the Board is actually comprised of only a few classroom teachers.²⁷ The majority of the Board is comprised of administrators or other non-educators who cannot adequately relate to the demands and life of a classroom teacher.²⁸ Since few on the Board know and can fully appreciate the job of a teacher, few educators perceive themselves to be self-governed.

2. Disciplinary Procedures

The SBEC "flags" a teacher's virtual certificate upon receipt of any complaint, without regard to the legitimacy of the complaint.²⁹ Thus, it is possible for any future employer, namely a school district, to search SBEC's website to uncover any restrictions that have been placed on a teacher's certificate.³⁰ These "flags" have an effect similar to a prior conviction or significant warning of a teacher's fitness to teach. This warning severely impairs the teacher's ability to find a job in another school district. Hence, the teacher is put in a legal purgatory until SBEC initiates a formal complaint with SOAH.³¹

24. See § 21.033.

25. See § 21.033 (providing three appointed non-voting members as representatives of the commissioner of education, commissioner of higher education, and the governor).

26. See § 21.033.

27. See TEX. EDUC. CODE ANN. § 21.033(a)(1) (Vernon Supp. 2004-2005) (stating that only four of the eleven voting members are actually teachers).

28. See § 21.033 (allocating two board members for administrators, and one for a counselor. The other four positions are reserved for those that have not been employed in the immediate past five years, and are currently not employed in education).

29. See Memorandum, *supra* note 14 (articulating that an investigatory warning is placed on the virtual certificate prior to any investigation).

30. See State Board for Educator Certification, Official Record of Educator Certificates, <http://www.sbec.state.tx.us/SBECOnline/virtcert.asp> (providing a database for all virtual certificates in the state of Texas) (last visited Oct. 11, 2005).

31. See State Board for Educator Certification, <http://www.sbec.state.tx.us/SBECOnline/about/agencywork.asp> (last visited Oct. 11, 2005); see also TEX. EDUC. CODE ANN. § 21.252 (Vernon 1996) (allocating jurisdiction to SOAH).

3. Rationale for Due Process Violation

When analyzing the current issue in the abstract, it seems intuitive that teachers are entitled to due process.³² However, on a policy level, it is clear that current procedures represent the state's fear of liability for employing a teacher who is under investigation for misconduct. This reasoning goes against constitutional ideals by not affording teachers the right to confront their accusers until after they have suffered irreparable consequences because of the mere accusation.³³ The United States criminal justice system was founded upon the legal principle that an accused person is innocent until proven guilty.³⁴ There must be a way to balance the desire to protect the general public, while preserving the rights guaranteed by the Constitution.³⁵

Additionally, SBEC uses a statutory argument to justify the current procedure. For example, the Texas Administrative Code ("TAC") provides that SBEC "may impose any additional conditions or restrictions upon a certificate that the board deems necessary to facilitate the rehabilitation and professional development of the educator or to protect students, parents of students, school personnel or officials."³⁶ This language can be interpreted to bestow upon SBEC the authority to place an investigative warning or restriction on a teacher's certificate, even before the commencement of an investigation.³⁷

The SBEC argues that the authority to flag certificates is derived from other legislation as well.³⁸ For example, section 552.001 of the Texas Government Code provides that "it is the policy of this state that each

32. See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) ("At its core, the right to due process reflects a fundamental value in our American constitutional system.").

33. See *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864))).

34. See Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AM. J. JURIS. 229, 233 (1996) ("The concept—that a man or woman charged with a crime should be presumed innocent and should remain innocent until proven guilty—is two thousand years old, if not older.").

35. See Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 101 (2004) (expressing the need to balance an individual's liberty and the restrictive power of the government); see also *id.* at 102 (advocating that fundamental fairness requires adequate notice, as well as an opportunity to be heard).

36. 19 TEX. ADMIN. CODE § 249.15(b) (2004).

37. See § 249.15(b).

38. Memorandum, *supra* note 14 (citing TEX. EDUC. CODE ANN. § 21.041 (Vernon 1996 & Supp. 2004-2005)) (authorizing SBEC to regulate in a manner that it sees fit); see also TEX. GOV'T CODE ANN. § 552.001 (Vernon 2004); TEX. GOV'T CODE ANN. § 552.007 (Vernon 2004) (compelling a government agency to release public information and authorizing that agency to voluntarily release other pertinent information of its own accord).

person is entitled, unless otherwise expressly provided by law. . . to complete information about the affairs of government.”³⁹ Moreover, section 552.007(a) authorizes a state agency to voluntarily release any information to the public that is not expressly prohibited by law.⁴⁰ The above statutes are used to rationalize the disclosure of damaging, and quite possibly inaccurate, information.

Even those who are inclined to be apathetic to a procedural due process issue are bothered by the possibility of repeated misconduct without swift justice.

4. Teacher Concern

While a district is theoretically permitted to hire a teacher with an investigatory warning “flag” on their virtual certificate, it is unlikely that a district would actually do so.⁴¹ As elected officials, and given that a teacher’s virtual certificate is available to the public, school board members would be unlikely to give their approval, even if they believed the teacher was wrongly accused, for fear of political backlash. For this reason, there has been substantial concern from teachers and teachers’ associations regarding SBEC’s policies and practices in dealing with teacher’s certificates.

The Texas Classroom Teachers Association (“TCTA”) recently filed a petition with SBEC requesting better regulation of its flagging policies.⁴² In its petition, TCTA requested two significant alterations to the current procedure.⁴³ In its first request, the TCTA sought articulation of exactly what type of misconduct allegation warrants a flagging.⁴⁴ Currently, all complaints—serious, minor, or clearly fraudulent—are flagged without distinction.⁴⁵ The petition further argues that misconduct of a *de minimis* nature should not be flagged.⁴⁶ *De minimis* offenses consist of: abandoning a contract; any misdemeanor that does not involve moral turpi-

39. § 552.001.

40. § 552.007. Though there is no statute that expressly forbids the disclosure of these warnings to the public, statutes do exist restricting the disclosure of comparable information in similar circumstances. See TEX. LOC. GOV’T CODE ANN. § 143.089 (Vernon 1996 & Supp. 2004-2005); TEX. LOC. GOV’T CODE ANN. § 143.1214 (Vernon Supp. 2004-2005) (restricting the ability of the government to disclose information regarding alleged misconduct of firefighters and police officers); see also TEX. EDUC. CODE ANN. § 21.355 (Vernon 1996 & Supp. 2004-2005) (providing that teachers’ appraisals are confidential).

41. See TEX. EDUC. CODE ANN. § 11.163 (Vernon 1996 & Supp. 2004-2005) (requiring either school board or superintendent approval as an integral part of the procedure for hiring teachers).

42. See Leahy, *supra* note 17.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

tude; or any other conduct not affecting the teacher's ability to safely supervise students.⁴⁷

TCTA's petition next advocated that the teacher should be able to petition the Executive Director of SBEC directly to seek the removal of such an investigative warning.⁴⁸ Currently, teachers are not afforded this option; they are forced to wait until a formal complaint has been filed. TCTA goes on to suggest that the petition should be granted unless good cause is shown to maintain the restriction.⁴⁹

TCTA's proposed plan is far more narrowly-tailored than the current plan. The proposed rule simultaneously balances the interests of the public in keeping teachers that are accused of serious misconduct from teaching until an investigation and a formal complaint are fully adjudicated, while still allowing teachers accused of *de minimis* offenses to continue serving as educators in Texas.⁵⁰ Moreover, it provides for an affirmative act on the part of the teacher to challenge the placement of an investigatory warning.⁵¹ The teacher is allowed to petition the Executive Director of SBEC to show good cause for the flagging,⁵² though the legal term "good cause" is somewhat ambiguous.⁵³

III. A BRIEF ANALYSIS OF PROCEDURAL DUE PROCESS

A. Overview

The Fifth Amendment ensures that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁵⁴ The Fourteenth Amendment reiterates such language as it pertains to a state's ability to operate.⁵⁵ Procedural due process challenges can be narrowed into three basic criterion: 1) there must be a deprivation; 2) of property,

47. Leahy, *supra* note 17.

48. *Id.*

49. *Id.*

50. *Id.* (acknowledging the need to disclose investigative warnings for those accused of serious violations, yet maintaining that those accused of *de minimis* violations are arbitrarily deprived of a liberty interest without due process).

51. See Julie Leahy, Texas Classroom Teachers Association, PETITION FOR ADOPTION OF A RULE, (July 5, 2004) (unpublished petition, on file with author) (requiring the teacher to petition to the Executive Director of SBEC in the event he wants to challenge the disclosure of the warning).

52. *Id.*

53. See generally Naomi McCuiston, Comment, *Good Cause in the Texas Rules of Civil Procedure*, 36 ST. MARY'S L. J. 445 (2005) (showing an in-depth analysis of the many meanings of the phrase "good cause").

54. U.S. CONST. amend. V.

55. See U.S. CONST. amend. XIV; see also *Ry. Express Agency v. New York*, 336 U.S. 106, 111-12 (1949) (Jackson, J., concurring) (tying the Fourteenth Amendment to the Constitution with Due Process).

liberty or life; 3) without due process afforded by law.⁵⁶ The state's deprivation of a teacher's unencumbered teaching certificate clearly satisfies the first requirement. The next two elements require a more comprehensive analysis. The following sections will examine the teacher's employment reputation as a property interest and as a liberty interest, each warranting varying degrees of due process.

B. *Deprivation of life, liberty or property?*

1. Property interest

Once a deprivation has been established, the deprivation must be shown to affect a recognized liberty or property interest.⁵⁷ The Supreme Court has held that a public employee who has a reasonable expectation of continued employment holds a property interest in that employment.⁵⁸ In the *Board of Regents v. Roth*,⁵⁹ the Court elaborates:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.⁶⁰

Similarly, "Texas courts have held that once the right or privilege to engage in a lawful profession or occupation is acquired, it is a right or privilege protected by the due process clauses of state and federal constitutions."⁶¹

A persuasive argument can be made that a teaching certificate, as a prerequisite to employment, also qualifies as a property interest. In addition to being essential for employment as an educator, there is reliance

56. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 526 (2d ed. 2002).

57. Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 871 (2000).

58. *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972) ("[I]n the area of public employment . . . public college professor[s] . . . have interests in continued employment that are safeguarded by due process." The Court further recalls the recent extension of this reasoning to a teacher who was hired under an implied promise for continuous employment rather than under a contract or tenure) (citing *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971); *Slochower v. Bd. of Educ.*, 350 U.S. 551 (1956); and *Wieman v. Updegraff*, 344 U.S. 183 (1952)).

59. *Roth*, 408 U.S. 564.

60. See *Roth*, 408 U.S. at 577; see also *Upshaw v. Alvin Indep. Sch. Dist.*, 31 F. Supp. 2d 553 (1999) (clarifying that once an individual has a property right in their employment, there must be an opportunity to be heard).

61. See *Leahy*, *supra* note 51 (citing *Francisco v. Bd. of Dental Exam'r*, 149 S.W.2d 619, 622 (Tex. Civ. App. – Austin, 1941, writ, ref'd) (citing TEX. CONST. art. I, § 19)).

upon its continued use. While flagging a teacher's certification does not immediately terminate employment, the practical effect on a teacher's ability to secure employment elsewhere is the same.

On the other hand, the Texas Supreme Court has suggested that a teaching certificate does not carry with it a property interest.⁶² In *State of Texas et al v. Project Principle*, a teachers' member group fought the retroactive application of the "Texas Examination for Current Administrators and Teachers" ("TECAT").⁶³ The TECAT was a state-administered exam, and the renewal of an educator's teaching certificate was contingent upon a passing score.⁶⁴ Until this time, teachers were under the impression that a teaching certificate was an irrevocable contract that, once issued, could not be modified by the state.⁶⁵ However, in *Project Principle*, the court held that a teaching certificate is a license and therefore revocable by the state.⁶⁶ "The [district] court also stated that because the certificate was a mere license, no due process guarantees were applicable."⁶⁷

However, the nature of the alleged due process violation in the TECAT cases makes them unlike the violation that occurs in "flagging" an accused teacher's virtual certificate. In the TECAT cases, teachers forfeit their certification if they fail to achieve a satisfactory score on the standardized test.⁶⁸ This is an objective measure of a teacher's actual qualification.⁶⁹ On the other hand, SBEC regulations are far more subjective, if not speculative. In restricting the certificates of teachers who have not yet been found guilty of any wrongdoing, a teacher's certificate and reputation is imposed upon even if the claim is never substantiated.

Additionally, the Supreme Court of Texas rationalizes their decision with an emphasis on substantive due process rather than procedural due process.⁷⁰ This is an important distinction, as it is possible that the court

62. See *State v. Project Principle*, 724 S.W.2d 387 (Tex. 1987); see also *Texas State Teachers Ass'n v. Texas*, 711 S.W.2d 421 (Tex. App. - Austin 1986, no writ) (agreeing with the holding in the *Project Principle* case concerning property interest in teaching certificates).

63. See *Project Principle*, 724 S.W.2d 389.

64. *Id.* at 389.

65. See *id.* at 390 (overruling petitioner's argument that a teaching certificate was a contract that could not be changed after execution).

66. See *id.* (citing *Marrs v. Mathews*, 270 S.W. 586, 589 (Tex. Civ. App. - Texarkana 1925, writ ref'd)).

67. *Id.* at 390 n.1.

68. *Project Principle*, 724 S.W.2d at 390.

69. See *id.* at 391 ("Likewise, teacher testing is a rational means of achieving the legitimate state objective of ensuring that public school educators meet a specified standards of competency.").

70. See *id.* (articulating certain appellate reviews that suffice the procedural due process issue).

would have come to a different conclusion if no procedural due process had been afforded to the teachers.

These distinctions make the reasoning in the TECAT cases inapplicable to the due process violation that occurs when teaching certificates are "flagged." A teacher can ensure compliance with the objective requirement of standardized testing.⁷¹ Conversely, a teacher cannot prevent the filing of a complaint without merit, and possibly, with malice.

Moreover, the TECAT cases are in direct conflict with the prior United States Supreme Court holding in *Bell v. Burson*.⁷²

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.⁷³

The Texas Supreme Court considers a teaching certificate to be a license.⁷⁴ Therefore, according to *Bell*, the teaching certificate, as a mere license, carries with it a certain amount of procedural due process.⁷⁵

In the *Bell* case, the Court could have reached a different conclusion if the state was requiring individuals to continue taking driving tests in order to maintain eligibility for their license.⁷⁶

It is important to note that in *Bell*, the court differentiates the amount of due process required for different types of interests.⁷⁷ For instance, "procedures adequate to determine a welfare claim may not suffice to try a felony charge."⁷⁸ Nonetheless, even if one was to assume that only a slight property interest is affected by "flagging" a teacher's virtual certifi-

71. See *id.* (providing a teacher with the opportunity to take the exam more than once).

72. *Bell v. Burson*, 402 U.S. 535 (1971).

73. See *id.* at 539 (citing *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

74. *Project Principle*, 724 S.W.2d at 390.

75. See *Burson*, 402 U.S. at 539 (stating that procedural due process is required before revoking or suspending a driver's license); see also *Barry v. Barchi*, 443 U.S. 55, 66 (1979) (holding that failure to hold a prompt hearing after suspending a horse training license is unconstitutional); see also *Barsky v. Bd. of Regents*, 367 U.S. 442, 452 (1954) (holding that suspension of a medical license requires due process consideration).

76. Compare *Burson*, 402 U.S. at 540 (hinting at a different conclusion if periodic driving tests were required to remain licensed) with *Project Principle*, 724 S.W.2d at 391 (noting that educators are allowed to retake the exam if they fail).

77. See *Burson*, 402 U.S. at 540 (holding that the amount of due process required may differ proportionally to the amount of deprivation).

78. *Id.*

cate, that interest still deserves due process. In *Goss v. Lopez*,⁷⁹ the United States Supreme Court held that its "view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."⁸⁰

2. Liberty Interest

Assuming, *arguendo*, that no property interest has been implicated, another strong argument exists in favor of a teacher's liberty interest in the ability to gain employment. The Supreme Court has defined both property interests and liberty interests, yet there are circumstances, like the situation at hand, which can obscure any distinction. As applied to the current case, a property interest can be implicated by the deprivation of a license,⁸¹ yet the deprivation also amounts to a liberty interest since it renders educators unable to gain future employment in their chosen profession.⁸² In the Supreme Court case *Board of Regents v. Roth*,⁸³ the Court defined a liberty interest as the right "to engage in any of the common occupations of life. . . and generally to enjoy those privileges long recognized. . . . In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."⁸⁴ There are many other cases which also suggest that a liberty interest is implicated whenever the state prevents someone from the opportunity of being employed.⁸⁵ The bottom line is that teachers are not free to seek other employment within their chosen profession because of a stigmatizing publication by SBEC that does not even attempt to suggest its validity. "The Supreme Court, in a procedural due process case, has defined the term 'occupational liberty' as the 'freedom to take advantage of other employment opportunities.'"⁸⁶ If SBEC is not trying to restrict a teacher's future employment by placing an investigatory warning on a

79. *Goss v. Lopez*, 419 U.S. 565 (1975).

80. *Id.* at 576.

81. See *Burson*, 402 U.S. 535 (holding that procedural due process is required before revoking or suspending a driver's license); see also *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (recognizing that a property interest is present in a horse training license).

82. *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972) (citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895-96 (1961) (holding that a liberty interest is stretched too far to apply a liberty interest in situations where the individual is free to seek other employment)).

83. *Roth*, 408 U.S. 564.

84. *Id.* at 572.

85. See *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Singleton v. Cecil*, 176 F.3d 419 (8th Cir. 1999); *Lee v. Dowling*, 664 N.E.2d 1243 (N.Y. 1996); *Richardson v. Chevrefils*, 552 A.2d 89 (N.H. 1988); *Singleton v. Chicago Sch. Reform Bd.*, 2000 U.S. Dist. LEXIS 8484 (N.Y. Dist. 2000).

86. See *Cecil*, 176 F.3d at 429 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

teacher's certificate, then what is the purpose of such a stigmatizing red flag? There is no other purpose on its face or otherwise. The only purpose is for SBEC to put school districts on notice that the teacher is being investigated for potential wrongdoing in order to minimize future liability of the state. Other courts have held that a balance must be struck between the state's interest and the significant risk of erroneous deprivations.⁸⁷ It is obtuse to think that such an investigatory warning does not dramatically minimize teachers' rights to seek employment in their chosen profession. Whether the investigation ultimately exonerates the teacher is irrelevant since no district will take a chance on that individual until the warning has been removed.

3. Liberty Interest of Reputation

Finally, an argument can be asserted that a liberty interest has been implicated as it pertains to a deprivation of reputation. There is no question that the restriction of one's certificate for alleged misconduct adversely affects one's reputation. *Goss v. Lopez* was a Supreme Court case concerning the loss of reputation.⁸⁸ In *Goss*, students were suspended for a period of less than ten days without due process of the law.⁸⁹ The Court held:

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause *must be satisfied*. . . . It is apparent that the claimed right of the State to determine unilaterally and *without process whether that misconduct has occurred immediately collides with the requirements of the Constitution*.⁹⁰

This language is directly on point with the loss of reputation a teacher suffers when a restriction is attached to a certificate. The only difference is that a teacher will suffer more significant consequences, since a teacher is restricted in the ability to secure a job.

Shortly thereafter, the Supreme Court diluted its holding in *Goss* in the following cases, *Paul v. Davis*⁹¹ and *Siegert v. Gilley*.⁹² In the *Davis* case, the Court held that a loss of reputation was not a deprivation of liberty

87. See *Dowling*, 664 N.E.2d at 1250; see also *Chevrefils*, 552 A.2d at 95 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

88. See generally *Goss v. Lopez*, 419 U.S. 565 (1975) (discussing the issue of a loss of reputation as a liberty interest for procedural due process purposes).

89. *Id.* at 568.

90. *Id.* at 574 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)) (emphasis added).

91. *Paul v. Davis*, 424 U.S. 693 (1976).

92. See generally *Davis*, 424 U.S. 693; see also *Siegert v. Gilley*, 500 U.S. 226 (1991) (holding that harm to reputation alone does not implicate a liberty interest).

per se.⁹³ However, the Court did recognize in *Siebert* that due process is required where the loss of reputation arises out of another tangible detriment, like termination of employment.⁹⁴ The current situation is a textbook example of such a claim. This leaves us with the question of how to balance due process interests. Is there another tangible detriment constituting a property interest or liberty interest?

Other courts have asked the same question in cases that address the situations of those in a position similar to Texas teachers.⁹⁵ For example, the New Hampshire Supreme Court took the above language a step further in *Richardson v. Chevretils*,⁹⁶ stating: "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, *notice and an opportunity to be heard are essential*."⁹⁷ The *Richardson* case involves a state welfare employee who was put on a registry comprised of child abusers after the welfare director learned that the plaintiff was involved in a child abuse incident.⁹⁸ The court held that the defendants erred in failing to provide notice and a hearing before placing him on the state registry.⁹⁹ While this court dances around the issue of reputation as a liberty interest, it found that both a liberty and property interest were implicated, and tied them intimately with the loss of reputation.¹⁰⁰ This case is nearly identical to the situation Texas teachers are currently facing. By issuing unsubstantiated warnings, the state is damaging the reputation of teachers, thereby preventing employment in their chosen profession.

The Court of Appeals of New York came to a similar conclusion in *Lee v. Dowling*.¹⁰¹ This case also involved a social worker, challenging the constitutionality of being placed on a registry of child abusers.¹⁰² Again, the court concluded that the stigma of a defamatory statement is not, in itself, sufficient to trigger due process.¹⁰³ The court used the "stigma plus" reasoning, which requires more than mere damage to reputation to warrant due process, but can be triggered when, for example, there is a

93. *Davis*, 424 U.S. at 712.

94. See *Siebert* 500 U.S. at 234; see also *Owen v. City of Independence*, 445 U.S. 622, 657 (1980).

95. See *Richardson v. Chevretils*, 552 A.2d 89, 95 (N.H. 1988) (citing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)); see also *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

96. *Chevretils*, 552 A.2d 89.

97. *Id.* at 95 (quoting *Constantineau*, 400 U.S. at 437) (emphasis added).

98. *Chevretils*, 552 A.2d at 90-92.

99. *Id.* at 96.

100. See *id.* at 93-95.

101. See *Lee v. Dowling*, 664 N.E.2d 1243.

102. *Id.* at 1246.

103. See *id.* at 1249.

loss of opportunity of future employment.¹⁰⁴ The preceding reasoning is a prime example of what Texas public school teachers are currently experiencing.

The court considered three factors in determining whether procedures mandated by statute protect one's procedural due process.¹⁰⁵ Those factors are: "(1) The private interest affected by the state action, (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional safeguards and (3) a consideration of the government's interest."¹⁰⁶ The court held that even though the government has an important interest in preventing child abusers from working for the state and also in keeping expenses down, there must be a balance of interests when taking into account the real possibility of erroneous listings of innocent individuals.¹⁰⁷

Finally, the court used a much-needed common sense approach stating, "it makes obvious sense in most cases 'to minimize substantially unfair or mistaken deprivations' by *insisting that the hearing be granted at a time when the deprivation can still be prevented*. That is particularly so in cases involving reputational [sic] injuries."¹⁰⁸ This language is clearly applicable for educators since one cannot reasonably be expected to refute allegations *before* their reputation is damaged.

C. Was It a Deprivation Without Due Process of the Law?

In this setting, it is clear that such a deprivation has occurred without due process of the law. This is not a case where one is challenging the sufficiency of due process afforded; the state affords *no* procedural due process. Unlike the functional, yet wholly-biased, school board hearings for termination of employees by the districts, this disclosure cannot be appealed.¹⁰⁹ To provide adequate procedural due process, both "notice and an opportunity to be heard" must be provided.¹¹⁰ Moreover, the Supreme Court case *Mullane v. Central Hanover Bank & Trust Co.*, articulates these requirements in the following quote:

104. See *id.* (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

105. *Id.* at 1250.

106. *Dowling*, 664 N.E.2d at 1250-51 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

107. *Id.* at 1251.

108. *Id.* at 1252 (emphasis added) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 79-82 (1972)).

109. See TEX. EDUC. CODE ANN. §§ 21.301-07 (Vernon 1996 & Supp. 2004-2005).

110. Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1722 (2004) (citing *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260-61 (2d Cir. 2001)).

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.¹¹¹

In the current situation, SBEC provides neither adequately.

The Texas Administrative Code sets forth the notice requirement in disciplinary proceedings attempting to suspend or otherwise sanction a teaching certificate; yet, the definition of compliance is remarkably unclear.¹¹² Section 249.14(h) states in pertinent part: "Prior to the agency's filing a petition, the agency shall mail. . . notice of the facts. . . to warrant the *intended action* and shall provide the person an opportunity to show compliance with all requirements of law for the retention of the certificate or other enjoyment."¹¹³ The rule itself is vague in view of the fact that it does not provide any timeline for such notice.¹¹⁴ Notice may be sent more than a year from the time that SBEC first receives an allegation. Assuming that this section could pass judicial scrutiny, there are serious doubts as to whether SBEC even complies with such a liberal regulation. The language "intended action" contained in §249.14(h),¹¹⁵ has, evidently, been improperly interpreted by SBEC as applicable only to the formal complaint brought to SOAH. This is due in large part to the vague nature of the definition.¹¹⁶ The SBEC is quick to forget that there are two "intended action[s]" that occur:¹¹⁷ the first is putting an investigatory warning on a teaching certificate, eliminating a teacher's ability to get a job;¹¹⁸ the second is the filing of the formal petition.¹¹⁹ The SBEC currently sends written notice at their leisure, specifying that the agency is currently seeking administrative action against the teacher.¹²⁰ This notice in no way warns the teacher that certification has already been flagged. In fact, teachers are usually unaware that their cer-

111. *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 313 (1950).

112. 19 TEX. ADMIN. CODE § 249.14(h) (2004).

113. § 249.14(h) (emphasis added); *see also* 19 TEX. ADMIN. CODE § 249.3(4) (2004) ("Agency - the board acting through its executive director, staff, or agents, as distinguished from the board acting through its voting members in a decision making capacity.").

114. § 249.14(h) (providing no timeframe for the written notice).

115. § 249.14(h).

116. *See generally* 19 TEX. ADMIN. CODE § 249.3 (2004) (omitting a formal definition of the phrase "intended action").

117. *See* § 249.14(h).

118. *See* Memorandum, *supra* note 14 (describing the placing of an investigatory warning on a teaching certificate).

119. *See* 19 TEX. ADMIN. CODE § 249.14(d) (2004) (discussing procedures and authority for a formal complaint to be filed).

120. *See* § 249.14(h) (showing that notice only must be given at the point that the board files a formal petition).

tificates contain a warning label until teachers unsuccessfully apply for a subsequent job. This is constitutionally impermissible since teachers never knew that their certificate was flagged, and never had the opportunity to answer to any allegations before being tainted by them.

Additionally, the restriction cannot be appealed because no formal complaint was ever filed. Therefore, a teacher has no choice but to find other means of income to pay their bills and future attorney's fees, until SBEC actually files a formal complaint. It is impossible to consider this situation adequate in terms of due process.

In fairness, SBEC does provide procedural due process once it files a formal complaint to SOAH.¹²¹ A teacher is afforded a hearing with an independent hearing examiner from SOAH.¹²² However, this does not mitigate the harm caused by the lack of procedural due process through the publication of the initial investigatory warning. The problem is that once SBEC files a formal complaint with SOAH, the damage has already occurred. By the time the hearing has been afforded, the educator has become both exhausted and disenfranchised with the lack of justice, and often pursues alternate forms of employment. For this deprivation without due process, SBEC must be held accountable.

IV. SOLUTION

Is there a solution to this constitutional quagmire? A solution does exist that will more narrowly-tailor the state's interest while also passing constitutional scrutiny.

The state has an important government interest in keeping those accused of sexual misconduct, or any other crime constituting moral turpitude that, if proven, would render an individual unfit to supervise from teaching while SBEC has an opportunity to investigate the claim.¹²³ However, teachers have a constitutionally-protected right to due process before being deprived of the ability to get a job in their chosen profession.¹²⁴ It is the proverbial question: when do my rights infringe upon

121. See § 249.14(h) (stating that written notice shall be sent prior to taking administrative action).

122. See TEX. EDUC. CODE ANN. § 21.252 (Vernon 1996) (allocating jurisdiction to SOAH).

123. See Eric J. Kuperman, Note, *The Mark of Cain: No Second Chance for Teachers Convicted of Sex Offenses Against Students*, 3 CARDOZO WOMEN'S L.J. 491, 511 (1996) ("The registration statute in question had a rational basis, namely the state's legitimate interest in controlling crime and preventing sex offenses." (citing *People v. Mills*, 81 Cal. App 3d 171, 181 (1978))).

124. See Theresa Keeley, Comment, *Good Moral Character: Already an Unconstitutionally Vague Concept and Now Putting Bar Applicants in a Post-911 World on an Elevated Threat Level*, 6 U. PA. J. CONST. L. 844, 871 n.177 (2003-2004) ("'Freedom to practice [a] chosen profession' and 'the right to . . . follow a chosen profession free from unreasonable

your rights; and when they do, whose rights prevail? Above, the *Bell* case discussed how the Court differentiated the amount of due process required by the amount of deprivation.¹²⁵ This is key in deciding what the court should interpret as sufficient due process in the case at bar.¹²⁶ A nominal set of procedures could very well be sufficient in the current set of circumstances.¹²⁷

The only two changes required to withstand constitutional scrutiny are notice that an investigatory warning has been posted, and a preliminary hearing or screening. The notice will: help to keep SBEC from erroneously flagging a certificate; inform the teacher about the investigatory warning; and provide the teacher with any available procedures to challenge this warning. The teacher should be able to request a preliminary hearing to decide whether SBEC believes that the charge is serious enough to warrant a full investigation, and likewise be able to request a timeline for filing a formal complaint. The hearing should take place within a reasonable time after the request. This hearing can be as informal as a phone conference with the parties' attorneys and an Administrative Law Judge, or even the Executive Director of SBEC. In fact, these proceedings could actually be adjudicated in preliminary pleadings, not unlike a motion to dismiss. Either way, this accomplishes three vital goals. First, it requires SBEC to open up their file in a timely manner and decide if there is even enough evidence to file a formal complaint. This alone serves to expedite the process since, as it stands now, it could be months before SBEC even has a chance to look at the file. Second, a teacher may fully admit to any misconduct and the parties can agree to a just punishment much quicker than if the file is gathering dust for the past few months. Finally, and of greatest significance to this comment, is that at the very least, the ball would be rolling. Once this occurs, teachers can take it upon themselves to advance the process.

Logistically and practically speaking, this process may become a rubber-stamping expedition, and afterwards the red flag will still be placed on the teaching certificate. For the purposes of this article, such measures would at least afford notice to teachers and a preliminary opportunity to be heard, and thereby withstanding constitutional muster. The reason that this mere facade of a hearing would work is that it provides some due process in allowing a teacher to subsequently appeal or otherwise

government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment.'" (quoting *Greene v. McElroy*, 360 U.S. 474, 492 (1959)) (emphasis added)).

125. *Bell v. Burson*, 402 U.S. 535, 540 (1971).

126. See *Burson*, 402 U.S. at 540 (explaining that different liberties require different amounts of procedural due process).

127. A teacher is not being put on trial for their life, but their ability to secure future employment. Therefore lesser procedures are appropriate. See *Burson*, 402 U.S. at 540.

expedite the entire process once the initial hearing has taken place. Otherwise, SBEC has no motivation to quickly adjudicate a teacher's case.

It is easy to understand and appreciate a state's interest in keeping those accused of gross misconduct from teaching until the state has a chance to adjudicate its case.¹²⁸ In fact, few would be persuaded by an argument advocating that accused sex offenders continue to teach.¹²⁹ Not unlike the chilling thought of a murderer not prosecuted, no one wants to see an unfit teacher in a classroom. That does not mean, however, that the state can arbitrarily deprive this class of educators the due process rights established in the Constitution.¹³⁰ Further analysis indicates that the solution proposed herein strikes a balance between granting rights to teachers and protecting the state's children.

This preliminary adjudication would require the state, namely SBEC, to offer evidence of the alleged misconduct before the hearing officer. For purposes of this hearing only, any evidence presented by SBEC would be presumed true. This is not unlike grand juries in the criminal field where any evidence the state presents is taken as true, and otherwise-inadmissible evidence is considered admissible for purposes of the indictment.¹³¹ Criminal jurisprudence allows this indictment procedure due to the understanding that defendants will get their day in court.¹³² A preliminary proceeding will effectively separate the teachers accused of sexual misconduct, crimes involving moral turpitude, or any other misconduct that renders the teacher unfit to supervise the youth of the state, from those teachers with investigatory warnings issued by mistake, or for inconsequential reasons. The fact is that many of the "heinous crimes" teachers are accused of are nothing more than a complaint filed by an agitated parent or colleague that has nothing to do with an educator's ability to teach in this state. In cases where the allegation, if true, would seriously and adversely affect a teacher's ability to supervise the youth of this state, SBEC should be able to flag the teacher's certificate until such a time that the allegations may be sufficiently investigated.

Alternately, in the case where teacher *A* dislikes teacher *B* and files a *de minimis* complaint to SBEC under the code of ethics, such complaint

128. See *Kuperman*, *supra* note 123, at 504 ("While it is important to carefully analyze the advantages and disadvantages of such a system, and to examine the rights of offenders, the interest in protecting children from imminent harm is paramount and should prevail.").

129. See *id.* at 495 (discussing policy goals of sex offender legislation).

130. See *Richardson v. Chevrefils*, 552 A.2d 89, 96 (N.H. 1988) (holding that although the state has a legitimate interest in keeping child abusers off the streets, procedural due process cannot be circumvented).

131. See Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. Rev. 1, 10 (1999) (articulating that inadmissible evidence is still permissible for purposes of the Grand Jury) (citing *Costello v. United States*, 350 U.S. 359, 361-63 (1956)).

132. *Costello v. United States*, 350 U.S. 359, 364 (1956).

does not affect teacher A's ability to supervise children in the state, and therefore, no investigatory warning should be applied. Again, this will also allow the parties to enter into negotiations in a more expedited fashion. Take, for instance, a teacher whose misconduct warrants a one-year suspension of their certification. It would behoove the teacher to take such a plea, since it would likely take more than a year before that teacher is provided the opportunity to fully adjudicate the merits. Giving both parties the opportunity to open the lines of communication earlier will help to increase plea bargaining which currently keeps our criminal system from getting so backed up. An increase in plea bargaining not only saves the SBEC time, it also helps save tax dollars by reducing the amount of the state's attorneys' fees.

This proposed solution not only provides for a constitutional means of providing due process, it also affords a constitutional means of keeping those accused of heinous crimes from teaching until such a time that guilt or innocence can be decided. Because the deprivation would be more narrowly-tailored to the goal of preventing criminals from teaching, the investigatory warning could actually contain stronger language. This would also help to close the loophole that currently allows those accused of sexual misconduct to hypothetically work at another school before charges have actually been brought.

One major concern would be the added expense of holding this preliminary hearing. Providing hearings that currently have not been adjudicated will increase the costs associated with the program, but there are aspects that would help mitigate those costs. First, these hearings would be very brief in time, lasting as few as fifteen minutes. This hearing only requires that SBEC articulate the allegation, as well as provide reasons why SBEC should be permitted to flag the teacher's certificate until such a time that they may complete their investigation. There would also be a few minutes allocated to teachers so they may argue why they should not be flagged during the interim period. As stated earlier, ultimate costs are likely to be minimized since this proposal encourages a teacher to accept a shortened suspension of their certificate rather than wait around for the case to be finally adjudicated.

V. CONCLUSION

Teachers, like all persons in the United States, are entitled to due process.¹³³ Sadly, a trend toward deprivation of a clean teaching certificate has emerged, costing some teachers the ability to seek employment.

133. See *Boddie v. Connecticut*, 401 U.S. 371, 374-75 (1971) ("At its core, the right to due process reflects a fundamental value in our American constitutional system.").

A solution has been proposed. It would not produce overwhelmingly costly changes and could save money in some cases. Supreme Court Justice Jackson links the due process protection to the equal protection clause in the following quote:¹³⁴

The framers of the Constitution knew. . . nothing opens the door to arbitrary action so effectively as to allow. . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.¹³⁵

Teachers historically receive an unequal share of responsibility and blame. Our society expects the impossible from them and punishes them for not working miracles. Current procedures have caused educators to become more guarded; both in and out of the classroom, adversely affecting the relationship with their students. The good old days where a teacher would give their students a ride home if their parents worked late are gone. Not because the need is gone and not because our teachers are unwilling, but because it is just too risky, and prudent teachers cannot afford to risk their careers to help a child in need.

Teachers are among the lowest-paid professionals that have a degree from four-year institutions.¹³⁶ Failing to provide due process creates an added burden to the hardship teachers endure as professionals. We are quick to forget that all successful people are products of one or more great teachers in their life,¹³⁷ and the relationship between student and teacher is of great importance.¹³⁸ As long as teachers are deprived of their due process rights, this remains the land of the free, for everyone except teachers.

134. See *Ry. Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

135. *Id.* at 112-13.

136. Dave Winans, *A Teacher's Worth*, NEA TODAY, Oct. 2004, <http://www.nea.org/neatoday/0410/teachercomp.html>.

137. Quotes for Teachers, <http://www.rit.edu/~andpph/text-quotations.html> ("Every artist was at first an amateur." (quoting Ralph W. Emerson) (last visited Oct. 17, 2005)).

138. Quotes for Teachers, <http://www.rit.edu/~andpph/text-quotations.html> ("I put the relation of a fine teacher to a student just below the relation of a mother to a son" (quoting Thomas Wolfe) (last visited Oct. 17, 2005)).

